IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA v. BAYQUIN ISRAEL AGUILAR-LOPEZ, *Defendant.*	CRIMINAL ACTION NO. 17-297

PAPPERT, J. **November 13, 2017**

MEMORANDUM

Bayquin Israel Aguilar-Lopez, a citizen of El Salvador, was deported from the United States in 2008 and 2010. On June 1, 2017, he was charged by indictment with unlawfully reentering the United States in violation of 8 U.S.C. § 1326(a) and (b)(1). He moves to dismiss the indictment on the grounds that his waiver of rights to a hearing before an immigration judge and to apply for relief from removal during his 2008 deportation proceeding was not knowing, intelligent or voluntary. After reviewing the motion, the Government's response and holding an evidentiary hearing and oral argument on November 6, 2017, the Court denies the motion for the reasons which follow.

I

A

Aguilar-Lopez entered the United States in June, 2003. (Government Ex. 1.)[1] On December 19, 2007, immigration agents took Aguilar-Lopez into custody in West Palm Beach, Florida after he admitted that he was a citizen of El Salvador and did not

[1] "Government Ex." refers to the exhibits admitted into evidence at the evidentiary hearing; Aguilar-Lopez did not seek to have any exhibits admitted.

possess the required documentation for him to be in the United States lawfully. Aguilar-Lopez was accordingly presented with a Notice to Appear, which contained the Department of Homeland Security's allegations that he was in the country illegally. (Government Ex. 2.) Aguilar-Lopez left unchecked on the Notice a box which would have indicated that he had a credible fear of persecution or torture in El Salvador.[2] Aguilar-Lopez was subsequently transferred to Texas and placed into ICE custody on October 7, 2008. (Government Ex. 3.)

Immigration Enforcement Agent Wyatt Storm interviewed Aguilar-Lopez on October 7. (*Id.*) Aguilar-Lopez was informed that he had the right to speak with a consular official from El Salvador and he was also provided with a list of free legal services. (*Id.*) During the interview, Aguilar-Lopez admitted that he entered the United States legally in June 2003 on a B-1 visa. (*Id.*) The visa expired six months later and as of 2008 he did not possess any immigration documents that would allow him to live or work legally in this country. (*Id.*) During the interview, Aguilar-Lopez signed four documents.

First, he signed a Notice to Appear form. (Government Ex. 4.) The form indicated again that Aguilar-Lopez did not assert a credible fear of persecution or torture in El Salvador. (*Id.*) It also stated that Aguilar-Lopez was allowed to be represented by an attorney in the removal proceedings and that a list of qualified

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[2] The language next to the unchecked box read: "This notice is being issued after an asylum officer has found that the respondent has demonstrated a credible fear of persecution or torture." Officer John Rife, a Deportation Officer with Immigration and Customs Enforcement from 2003-2014 and Supervisory Officer since 2014, testified at the hearing that if an alien makes any credible claim that they are afraid to return to their country, an Asylum Officer will conduct a credible fear interview. (Hr'g Tr. 13:2-10, Nov. 6, 2017.) Based on Officer Rife's knowledge of the process and documents, he explained that the fact that the box was not checked meant that the individual did not say they had a credible fear of persecution or torture. (Hr'g Tr. 14:2-21.) Officer Rife was the only witness to testify at the hearing.

attorneys and organizations would be provided to him. (*Id.*) He was provided oral notice in Spanish about the contents of the form.[3] (*Id.*) Second, Aguilar-Lopez signed a Notice of Custody Determination form. (Government Ex. 5.) This form indicates that he did not request a redetermination of the custody decision by an immigration judge. (*Id.*) Third, Aguilar-Lopez received a Notice of Rights and Advisals. (Government Ex. 6.) The form was in Spanish and informed him that he had the right to contact an attorney or other legal representative to represent him at hearings or to answer any questions regarding his legal rights. (*Id.*) He also checked, initialed, and signed the form indicating that he did not believe he would face harm if he returned to El Salvador and that he gave up his right to a hearing before the Immigration Court. (*Id.*) Fourth, Aguilar-Lopez signed a Stipulated Request for Order Waiver of Hearing Pursuant to 8 C.F.R. § 1003.25(b) (the "Stipulated Request"). (Government Ex. 7.) The form is written in English and Spanish. Aguilar-Lopez initialed the form to indicate that he did not wish to be represented by an attorney. (*Id.* ¶ 2.) The form also made clear that he did not wish to apply for relief from removal, was not seeking relief of voluntary departure, asylum, withholding of removal or adjustment of status. (*Id.* ¶ 6.) Aguilar-Lopez read the document or had it read to him in Spanish and attested that he fully understood its consequences. (*Id.* ¶ 12.)

Immigration Judge Sims reviewed the signed documentation and on October 17, 2008, ordered Aguilar-Lopez's removal from the United States to El Salvador. (Government Ex. 8.) He was removed on November 28, 2008. (Government Ex. 10.)

[3] Officer Rife informed the Court that if the officer conducting the interview is unable to speak Spanish, interpreter lines are available. (Hr'g Tr. 19:13-24.)

B

Aguilar-Lopez soon thereafter illegally reentered the United States by wading across the Rio Grande River and was arrested by agents in Texas on January 20, 2009. (Government Ex. 11.) He was interviewed the next day and again indicated that he did not fear returning home to El Salvador and signed an affidavit attesting to that fact. (Government Ex. 12.) Because Aguilar-Lopez reentered illegally, the October 2008 deportation order was reinstated, something he did not contest. (Government Ex. 14.)

On February 10, 2009, Aguilar-Lopez was indicted in the Southern District of Texas on one count of unlawfully reentering the United States after deportation, in violation of 8 U.S.C. § 1326(a) and (b). (Government Ex. 14.) He pled guilty and on November 25, 2009, was sentenced to time-served, 310 days' imprisonment. (Government Ex. 15.) In an interview on December 12, 2009, Aguilar-Lopez indicated that he did not fear persecution or torture should he be removed from the United States.[4] (Government Ex. 16.) On February 15, 2010, Aguilar-Lopez was deported to El Salvador. (Government Ex. 18.)

Aguilar-Lopez reentered the United States again in 2013 and was arrested on April 23, 2017 for driving under the influence in Upper Merion Township, Montgomery County, Pennsylvania. (Def. Mot., Ex. B.) Those charges remain pending. Because Aguilar-Lopez reentered illegally, on May 8, 2017, the Department of Homeland Security provided notice to Aguilar-Lopez of its intention to reinstate the October 2008 deportation order. (Government Ex. 19.) The Grand Jury returned its indictment on

[4] He was also presented with an Advisal of Rights form which informed him that he had the right to request political asylum if he was afraid of being persecuted on the basis of race, religion, nationality, association with a particular social group, or political opinion upon returning to El Salvador and if so, he must inform the agent who gave him the notice. He did not do so. (Government Ex. 17; Hr'g Tr. 52:25-53:9.)

June 1, 2017, charging Aguilar-Lopez with illegal reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(1). (ECF No. 1.) Aguilar-Lopez argues that the October 2008 removal order is invalid because he did not waive his rights in the October 2008 Stipulated Request knowingly, voluntarily, or intelligently.

II

Federal Rule of Criminal Procedure 12(b)(3)(B) allows a defendant to move to dismiss an indictment if it is defective. A defendant may seek to dismiss an indictment charging a violation of 8 U.S.C. § 1326(a) if it was based on an invalid removal order. *See United States v. Charleswell*, 456 F.3d 347, 352-53 (3d Cir. 2006). To collaterally attack a removal order, a defendant must prove that:

> (1) the alien exhausted any administrative remedies that may have been available to seek relief against the order;
> (2) the deportation proceedings at which the order was issued improperly deprived the alien of the opportunity for judicial review; and
> (3) the entry of the order was fundamentally unfair.

See 8 U.S.C. § 1326(d). In *Richardson v. United States*, 558 F.3d 216, 223 (3d Cir. 2009), the Third Circuit Court of Appeals held that the defendant bears the burden of proof as to each element of this tripartite test.

III

A

Aguilar-Lopez does not attempt to satisfy the first two prongs, arguing that he is excused from doing so because the entry of the October 2008 Order was fundamentally unfair as his waiver of rights in the Stipulated Request was allegedly not knowing, voluntary, and intelligent. (Def. Mot. at 10; Hr'g Tr. 80:13-21.) After *Richardson*, it remains unclear whether a defendant has to prove all three elements or if a showing of

fundamental unfairness exempts him from proving that he also exhausted his administrative remedies and was deprived of the opportunity for judicial review of the deportation proceedings. *See Richardson*, 558 F.3d at 223 n. 5. In any event, Aguilar-Lopez cannot show that the entry of the removal order was fundamentally unfair.

B

To prove the fundamental unfairness entry of a removal order, the alien must show that there was a fundamental defect in the proceeding and that defect caused him prejudice. *Richardson*, 558 F.3d at 224. Aguilar-Lopez contends that the entry of the deportation order was fundamentally unfair for two reasons. First, he argues that his waiver of rights on the 2008 Stipulated Request was not knowing, intelligent, or voluntary. (Def. Mot. at 8.) Second, he asserts that he should have received an "Orantes Advisal" from immigration authorities.[5] (Def. Mot. at 5.)

i

An alien may validly waive his rights associated with a deportation proceeding if he does so voluntarily and intelligently. *Richardson*, 558 F.3d at 219-20. If an alien is unrepresented, an immigration judge must determine that the alien's waiver was voluntary, knowing, and intelligent. 8 C.F.R. § 1003.25(b). The judge then may enter an order without a hearing and in the absence of the parties based on a review of the charging document and the written stipulation. (*Id.*) A stipulated order is conclusive determination of an alien's removability. (*Id.*) Under the Code of Federal Regulations, a stipulation, here the Stipulated Request, must include:

[5] In his brief, Aguilar-Lopez also argued that he would have been eligible for asylum under the Nicaraguan Adjustment and Central Americans Relief Act ("NACARA"). He withdrew this argument at the hearing. (Hr'g Tr. 104:16-105:13.)

> (1) An admission that all factual allegations contained in the charging document are true and correct as written;
> (2) A concession of deportability or inadmissibility as charged;
> (3) A statement that the alien makes no application for relief under the Act;
> (4) A designation of a country for deportation or removal under section 241(b)(2)(A)(i) of the Act;
> (5) A concession to the introduction of the written stipulation of the alien as an exhibit to the Record of Proceeding;
> (6) A statement that the alien understands the consequences of the stipulated request and that the alien enters the request voluntarily, knowingly, and intelligently;
> (7) A statement that the alien will accept a written order for his or her deportation, exclusion or removal as a final disposition of the proceedings; and
> (8) A waiver of appeal of the written order of deportation or removal.

8 C.F.R. § 1003.25(b).

The 2008 Stipulated Request adheres fully to the CFR's requirements, something Aguilar-Lopez concedes. (Government Ex. 7; Hr'g Tr. 112:4-14.) The Stipulated Request, which he read in Spanish and fully understood, also explicitly informed Aguilar-Lopez that signing the document would result in his removal from the United States. (Government Ex. 7, ¶ 12.) Moreover, Aguilar-Lopez does not contend that he was pressured to sign the waiver, was confused about its contents, or that he did not want to sign it. (Def. Mot. *passim*.) In short, he presented no evidence that he was not advised of his rights in a language he could understand, that the INS agent's characterization of his rights were misleading in anyway, or that he was confused by anything that he read in October 2008.[6] (Hr'g Tr. 94:11-95:2.)

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[6] Courts have held that waivers were valid even when individuals did not have attorneys present, individuals claimed they were pressured to sign the form and claimed that they did not have a sufficient level of education to understand the papers. *See United States v. Gomez*, No. 11-6004, 2011 WL 1654904 (E.D. Wash. May 2, 2011) (rejecting defendant's argument that a waiver presented in English and in Spanish was invalid even though he did not have an attorney, only attended school through sixth grade, claimed he never read the form himself, and signed it while many others were

Aguilar-Lopez's sole basis for contending that the proceeding was fundamentally unfair is that although the documents were written in English *and Spanish*, they "contain[ed] a lot of legal words without definitions" and the information was not "explained beyond legal catch phrases." (Hr'g Tr. 84:4-7; 89:18-22.) Aguilar-Lopez provides no legal support for his argument that the inclusion of "complex" legal terms without a glossary invalidates a stipulation which complies with all legal requirements. (Hr'g Tr. 85:5-21, 88:7-15, 96:22-97:19.)

ii

The Orantes Advisal is a document containing additional notices that must be read to Salvadorans subject to removal from the United States pursuant to certain provisions of the Immigration and Nationality Act. Although Aguilar-Lopez argues that the proceeding where he waived his rights through the Stipulated Request was fundamentally unfair because he was not read the Orantes Advisal, he is unsure if the Orantes Advisal even applies to him.[7] (Def. Mot. at 5; Hr'g Tr. 104:7-13.)

Even if the Orantes Advisal applied to Aguilar-Lopez, he did not suffer prejudice. The purpose of the Advisal is to ensure that aliens from El Salvador are aware of their rights to seek asylum and be represented by a lawyer. (Def. Mot., Ex. K.) During the 2008 proceeding, Aguilar-Lopez was informed four times of his right to have an

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present in his cell); *United States v. Baptist,* 759 F.3d 690, 696 (7th Cir. 2014) (rejecting defendant's argument that the waiver was invalid because he did not have counsel and did not read the removal papers); *United States v. Soto-Mateo*, 799 F.3d 117 (1st Cir. 2015) (rejecting defendant's argument that he did not knowingly waive his rights when he didn't assert that he was illiterate or provide any basis for the court to determine that he was pressured into signing the form without an attorney present).

[7] The Orantes Advisal memorandum from United States Immigration and Customs Enforcement indicates that the advisals should be read to Salvadorans that are subject to removal pursuant to INA § 235(b). (Def. Mot., Ex. J.) The Notice of Intent forms provided to Aguilar-Lopez state that he was removed pursuant to Section 240 of the INA. (Government Exs. 2, 4.)

attorney, twice stated that he didn't fear persecution or torture if returned to El Salvador, and once stated that he was not seeking asylum. *See supra* Section (I)(A).

An appropriate order follows.

BY THE COURT:

/s/ Gerald J. Pappert
GERALD J. PAPPERT, J.